RECORD
AND
BRIEFS

No. 09-862

In The

Supreme Court of the United States

JOHN ANTHONY MAGYAR,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari
To The Mississippi Supreme Court

PETITION FOR REHEARING

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PETITION FOR REHEARING

PETITIONER RESPECTFULLY MOVES THIS COURT FOR AN ORDER (1) VACATING ITS ORDER OF MAY 17, 2010, WHICH DENIED THE PETITION FOR WRIT OF CERTIORARI FILED BY PETITIONER ON JANUARY 20, 2010, AND (2) GRANTING THE PETITION FOR WRIT OF CERTIORARI. THE GROUNDS FOR REHEARING ARE STATED BELOW.

REASON FOR GRANTING REHEARING

INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL AND CONTROLLING EFFECT HAVE OCCURRED SINCE PETITIONER FILED HIS PETITION FOR WRIT OF CERTIORARI.

WHILE PETITIONER'S PETITION FOR WRIT OF CERTIORARI WAS UNDER CONSIDERATION BY THIS COURT, THE COURT RULED IN *PADILLA V. KENTUCKY*, ___ U.S. ___, 130 S. CT. 1382 (MARCH 31, 2010), THAT AN IMMIGRANT TO THE UNITED STATES MUST BE ADVISED BY HIS LEGAL COUNSEL, PRIOR TO PLEADING GUILTY TO A CRIMINAL OFFENSE, THAT A CRIMINAL CONVICTION WOULD HAVE SEVERE ADVERSE IMMIGRATION CONSEQUENCES TO HIM, AND THAT FAILURE OF HIS COUNSEL TO ADVISE HIM OF THOSE ADVERSE IMMIGRATION CONSEQUENCES CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH

AMENDMENT TO THE UNITED STATES CONSTITUTION.

PRIOR TO *PADILLA V. KENTUCKY*, COURTS WERE VERY RELUCTANT TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO ADVISE OF COLLATERAL CONSEQUENCES. SOME CONSEQUENCES HOWEVER, BEING SO CLOSELY CONNECTED TO THE CRIMINAL PROCESS, ARE UNIQUELY DIFFICULT TO CLASSIFY AS EITHER DIRECT OR COLLATERAL. *PADILLA V. KENTUCKY*, 130 S. CT. 1382 (MARCH 31, 2010), FINDS THAT DEPORTATION IS ONE OF THOSE UNIQUE CONSEQUENCES; MANDATORY SEX OFFENDER REGISTRATION IS ANOTHER.

SEX OFFENDER REGISTRATION IS JUST AS, IF NOT MORE, CLOSELY CONNECTED TO THE CRIMINAL PROCESS AND AUTOMATIC THAN DEPORTATION. JOHN ANTHONY MAGYAR'S COUNSEL FAILED TO ADVISE HIM OF MANDATORY LIFETIME SEX OFFENDER REGISTRATION REQUIREMENTS PRIOR TO HIS GUILTY PLEA TO A SEX OFFENSE. THE LOWER COURTS HAVE DENIED RELIEF TO MAGYAR DUE TO REGISTRATION BEING A "COLLATERAL CONSEQUENCE."

MAGYAR WOULD RATHER FACE DEPORTATION THAN A LIFETIME OF UNEMPLOYMENT, SCORN AND EXILE FROM SOCIETY,

FOR MANY, A MORE SERIOUS CONSEQUENCE THAN DEPORTATION.

John Anthony Magyar entered a guilty plea to a sex offense in state court without having been advised by the trial court, or his court appointed legal counsel, that a sex offense conviction automatically results in being sentenced to lifetime registration as a sex offender. Magyar initially learned of mandatory lifetime sex offender registration at sentencing, and thereafter petitioned for post conviction collateral relief, seeking to set aside his plea due to not having received effective assistance of counsel (among other grounds). The trial court denied Magyar's motion without affording Magyar a hearing, denying Magyar an opportunity to show prejudice and without requiring the State of Mississippi to file an answer.

Both the Mississippi Court of Appeals and the Mississippi Supreme Court[1] affirmed, using the wrong legal standard, resulting in a violation of Magyar's Sixth Amendment right to counsel, yet to be cured.

The Mississippi Court of Appeals, erroneously using the due process standard applicable to trial courts, affirmed the trial court's ruling regarding the effectiveness of counsel claim. Subsection II. of the Mississippi Court of Appeals opinion is entitled: ***Was***

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[1] Expressly adopting the Mississippi Court of Appeals opinion on this claim. "All other aspects of the decision of the Court of Appeals in this matter are adopted herein." Pet. at App. 9.

Magyar's counsel ineffective? Pet. at App. 22. In that section, the opinion reads:

> ***As discussed above, Mississippi law does not require that Magyar be informed that he has to register as a sex offender for his guilty plea to be knowing, intelligent, and voluntary. . . .***

Pet. at App. 24.

The "discussed above" portion of the opinion which the Mississippi Court of Appeals was referring to was summed up earlier, in the due process portion of the opinion, by the Mississippi Appeals Court stating:

> ***We find that the fact that Magyar must register as a sex offender is merely a collateral consequence of his guilty plea. We find that this issue[2] is without merit.***

From the outset, the Mississippi Court of Appeals had been asked to review the effectiveness of counsel claim from a United States Constitutional standpoint, not only "Mississippi law" as the Court of Appeals generally referred to when denying Magyar's claim. Further, and perhaps more importantly, the Mississippi Court of Appeals, and by express adoption, the Mississippi Supreme Court, erroneously recited and applied the "knowing, intelligent, and voluntary" standard of due process analysis to Magyar's Sixth

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[2] Due Process

Amendment Effectiveness of Counsel Claim, and upon that inapplicable ground, denied Magyar's Sixth Amendment claim. In reaching its conclusion that Magyar's Sixth Amendment right to counsel had not been violated, the lower Courts declared that counsel did not have the duty to advise Magyar of sex offender registration because such registration was "merely a collateral consequence of his guilty plea." Pet. at App. 20.

Thus, Magyar's petition comes before this Court in a nearly identical posture as did ***Padilla v. Kentucky***. In ***Padilla***,

> **. . . the Supreme Court of Kentucky denied Padilla post conviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction. . . .**

Padilla v. Kentucky, 130 S. Ct. 1382 (March 31, 2010).

The collateral versus direct consequence distinction is a constitutional fabrication regarding Sixth Amendment jurisprudence. It has never been applied by the United States Supreme Court. ***Padilla v. Kentucky***, 130 S. Ct. 1382 (March 31, 2010). Lower courts should not be allowed to apply that distinction preserved for the analysis of the duties and conduct of

trial judges to the review of duties and conduct of counsel, two entirely different duties altogether.

Regardless of how this Court would view the above position, like the consequence of deportation in ***Padilla***, due to the unique nature of mandatory life time sex offender registration, it is not necessary to now determine whether the collateral versus direct consequences analysis should be applied to effectiveness of counsel claims.

Whether or not sex offender registration is technically a "criminal penalty," it is part of the sentence in the criminal proceeding. It is intimately related to the criminal process. Like deportation, sex offender registration is automatic. Like deportation, the judge has no discretion whether or not to order registration and even if he/she does not order it, the defendant is still subject to it (registration or deportation). Like deportation, it would be most difficult to divorce sex offender registration from the conviction requiring it. The trial judge is required to order it, the legislature (or Congress with regard to deportation) mandates it and if the defendant fails to do it, he commits another criminal offense. Like deportation, mandatory sex offender registration, *as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.*[3]

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[3] "Whether post-release registration is a collateral or direct consequence of a guilty plea is, admittedly, a close question; it

(Continued on following page)

See ***Padilla v. Kentucky***, 130 S. Ct. 1382 (March 31, 2010) at Section II. Like deportation, this claim should also be subject to ***Strickland v. Washington***, 466 U.S. 668 (1984) analysis, which the lower courts effectively refused to do.

Moreover, mandatory lifetime sex offender registration would be and is, for many citizens of the United States, every bit as severe and devastating as deportation is for many non-citizens. The Mississippi sex offender registration statute, like those of many states, is extremely broad, severe and inclusive with regard to (1) who must register for life and (2) how the registrant is forever limited. It includes minors adjudicated delinquent in Youth Court, and persons found not guilty by reason of insanity. See M.C.A. § 45-33-27(1) (1972). Those subject to the statute:

> – will submit address, name, place of employment, date of birth, age, race, sex, height, weight, hair color, place of birth, date and place of Court adjudication and social security number and "any other identifying factors" to the local law enforcement of any community she shall ever live in;
>
> – submit DNA samples to law enforcement, to be included in computer data base;
>
> – submit fingerprints to be included in data base;

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is certainly definite and automatic." ***Magyar v. Mississippi, Kitchens Concurring***, Pet. at App. 12.

– submit to law enforcement any online username, screen name or online identity he has ever used;

– submit to law enforcement information regarding any anticipated future residence;

– may not reside within 1500 feet (500 yards) of any public or private school (or its property);

– may not reside within 1500 feet of any child care facility;

– may not reside within 1500 feet of any playground;[4]

– may not reside within 1500 feet of any ball park "or other recreational facility";

– may not be present in a school, or stand within 500 feet of a school without special permission;[5]

– must show proof of domicile and personally appear at the department of public safety 10 days before moving to another residence;

– personally appear at the Department of Public safety within 3 days of any change of employment M.C.A. § 45-33-29(3); and

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[4] 2008 amendment to M.C.A. § 45-33-25(4)(a) (1972) as amended.

[5] M.C.A. § 45-33-26 (1972) as amended.

> – personally appear at the Mississippi Department of Public Safety, **every 90 days**, for the remainder of her life, give a new photo, update all information, including residence and employment, and pay "any required fees."

Registrant information will be placed on the internet, for the world to see, forever. The registrant will be a target of ridicule and scorn, people will protest if he moves to the neighborhood, parents will not let their children play with his children, he will have extreme difficulty finding employment. Magyar, of course, represents thousands of criminal defendants, adult and juvenile, facing charges of sexual misconduct, often facing attractive plea offers of minimum incarceration or probation, who have no idea that accepting such an offer actually triggers a life sentence of exile. Without question, the Mississippi registration act imposes onerous permanent obligations and burdens upon the life of the registrant. It is not burdensome however, upon competent legal counsel, to advise the client, at least to some minimal extent, that public registration would be required upon a guilty plea. Given the complexities of immigration law, the burden of giving general sex offender registration advice would be slight compared to giving accurate immigration advice to non-citizens facing criminal charges, which is now constitutionally required under ***Padilla***.

CONCLUSION

Padilla v. Kentucky, 130 S. Ct. 1382 (March 31, 2010), having been decided while this petition for writ of certiorari is under consideration, the Court is urged to reconsider granting the writ requested. Like deportation, life-time sex offender registration is swift, certain and severe, and cannot be divorced from the criminal process. It is the most definite consequence of a sex offense criminal conviction and is often the most severe, lasting forever. To divorce advising a criminal defendant of the definite, severe consequence of mandatory life-time public registration, from the defense attorney's obligation is absurd. Like deportation, it is a consequence that is unique and ill suited for the collateral versus direct consequence analysis.

Sex offender registration requirements in nearly all states impose great and permanent burdens and restrictions upon the lives of registrants. Some states, including Mississippi, limit where offenders may reside and require a personal appearance registration update, every 90 days, at the local Sheriff's office or other government agency. Updates must also be given in other instances such as whenever the registrant changes residence or his or her physical appearance. Failure to strictly comply constitutes a separate felony offense. Much information about the offender is placed in the public domain for all to see. The offender is forever shunned from normal society. The registration requirements are the most definite, automatic and immediate consequences of a guilty

plea to a sex offense. Other aspects of sentencing are discretionary with the trial court, while registration requirements are not discretionary. Despite the severe, automatic nature of sex offender registration requirements however, most states have determined that such requirements are mere collateral consequences to a guilty plea and therefore, Fifth Amendment Due Process does not require Courts to advise the criminal defendant of the requirements prior to a guilty plea and the Sixth Amendment does not require counsel to do so.

Some courts have held that counsel's failure to advise a criminal defendant of mandatory sex offender registration constitutes ineffective assistance of counsel (especially where elements of mis-advice are present as in Magyar's case), while the majority of courts have ruled to the contrary. More often than not, courts failing to find ineffective assistance of counsel in these circumstances reach its conclusion by applying the Fifth Amendment Due Process "collateral consequence rule" analysis. Such analysis is erroneous as effective counsel's duty to the defendant is much more broad and different from the duties of the court. This Court should grant certiorari to settle the question of whether the Fifth Amendment Due Process collateral consequences rule should be applied to ineffective assistance of counsel questions and specifically, to settle the dispute as to whether or not counsel's failure to advise a client of mandatory lifetime sex offender registration constitutes

ineffective assistance of counsel under the Sixth Amendment to the United States Constitution.

Given that mandatory registration is so similar to mandatory deportation and given the holding in ***Padilla v. Kentucky***, the lower courts will soon be faced with the issues here raised regarding sex offender registration on a more frequent basis. It could take years of inconsistent results before the issue comes again to this Court. The issue is now ripe however, for resolution.

For the reasons as set forth above, the petitioner submits that his rights under the Fifth and Sixth Amendments to the United States Constitution have been violated and requests that appropriate relief be granted unto him, including, but not limited to his plea of guilty being vacated and set aside, or in the alternative, as in ***Padilla v. Kentucky***, 130 S. Ct. 1382 (March 31, 2010), that this matter be remanded to the trial court for a hearing on the issue of prejudice.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

JAMES L. KELLY